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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 442

J. EDWIN L·VALLEE and DANIEL McMANN,

Petitioners,

against

JAMES P. CARAFAS, HENRY WILSON and LEON E. WEST,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

J. EDWIN LAVALLEE and DANIEL MCMANN,

Petitioners,

against

JAMES P. CARAFAS, HENRY WILSON and LEON E. WEST,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, wardens of the two New York State prisons in which respondents are presently incarcerated,* pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit in the cases of *United States ex rel. James P. Carafas* v. *Murphy* (judgment entered June 22, 1964); *United States ex rel. Henry Wilson* v. *Murphy* (judgment entered July 16, 1964; and *United States ex rel. Leon E. West* v. *LaVallee* (judgment entered July 21, 1964).

* Petitioner LaVallee is at present the Warden of Auburn State Prison, Auburn, New York, where respondents Carafas and Wilson are inmates. Petitioner McMann is Warden of Clinton State Prison, Dannemora, New York, where respondent West is incarcerated.

Citations to Opinions Below

Neither the District Court nor the Circuit Court opinions in any of these cases have as yet been reported. The opinions are reproduced in appendices to this Brief, together with the relevant state opinions. The *Carafas* opinions are contained in Appendix A; the *Wilson* opinions in Appendix B; and the *West* opinions in Appendix C.

Jurisdiction

The judgment of the United States Court of Appeals in the *Carafas* case was entered on June 22, 1964; in the *Wilson* case on July 16, 1964; and in the *West* case on July 21, 1964.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. In view of the deterrent purpose of the exclusionary rule announced by this Court in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), *must* that rule be extended, as a constitutional command, to cases in the appellate process on the date of that decision, so as to vitiate pre-*Mapp* state convictions even in cases where the defendant made no objection to the admission of evidence later claimed to have been illegally seized?

2. Even assuming, *arguendo*, that the Circuit Court was correct in holding that the exclusionary rule must be applied to cases in the state appellate process on the date of the *Mapp* decision, was the Circuit Court's remand of these cases to the District Court with directions to determine the merits of the prisoner's claims—without opportunity for litigation in the state courts of the factual issues

—such a departure from the proper course of judicial proceedings as to call for the exercise of this Court's power of supervision over the federal judiciary?

Statement of the Case

All of the respondents are New York State prisoners, convicted at trials held prior to the decision of this Court in *Mapp* v. *Ohio*, 367 U. S. 643 (1961). Each appealed his conviction, raising on appeal the question of whether the *Mapp* decision required reversal of the conviction on the ground that illegally obtained evidence had been introduced at trial. In each instance the convictions were affirmed by the State's appellate courts, and the respondents then applied to the United States District Court for the Northern District of New York for writs of habeas corpus pursuant to 28 U.S.C. § 2241 *et seq.* These applications were denied. On appeal to the Court of Appeals for the Second Circuit, however, the District Court decisions were reversed and the cases remanded for determination of the merits of the respondents' claims that evidence illegally seized was used against them.

The position of the New York State courts with respect to application of the *Mapp* holding has been clearly set forth—the exclusionary rule is applicable as a constitutional command in all trials taking place after June 19, 1961 (cf. *People* v. *Loria*, 10 N. Y. 2d 368, 370 [1961]); it is applied to pre-*Mapp* convictions only when still in the process of direct appellate review on the date of the *Mapp* decision (cf. *People* v. *Muller*, 11 N. Y. 2d 154 [1962]), and only where sufficient objection has been made at the trial (see *People* v. *Friola*, 11 N. Y. 2d 157 [1962]; *People* v. *O'Neill*, 11 N. Y. 2d 148 [1962]; *People* v. *Coffey*, 11 N. Y. 2d 142 [1962]). In addition, an intermediate appellate court may, regardless of whether objection was made at trial, reverse a pre-*Mapp* conviction in the inter-

ests of justice or because the trial court judgment was against the weight of the evidence, and may, in making such a determination, consider the circumstance that illegal evidence was taken (see *People* v. *Kelly*, 12 N. Y. 2d 248 [1963]).

In its opinion in the *Carafas* case, dated June 22, 1964 the Court of Appeals first said that both this Court and the New York Court of Appeals "have clearly held that *Mapp* applies to cases in the appellate process at the time of that decision, at least where sufficient objection was made at the pre-*Mapp* trial to preserve the constitutional question for state appellate review. *Fahy* v. *Connecticut*, 375 U. S. 85 (1963); *Ker* v. *California*, 374 U. S. 23 (1963); *People* v. *Loria*, 10 N. Y. 2d 368, 179 N. E. 2d 478, 223 N.Y.S. 2d 462 (1961)" (11a).*

The Circuit Court then went beyond the previous cases as it read them and held that, under its decision in *United States ex rel. Angelet* v. *Fay*, 333 F. 2d 12 (2d Cir. June 11, 1964), the failure to object could not be considered a waiver under *Fay* v. *Noia*, 372 U. S. 391 (1963), and *Johnson* v. *Zerbst*, 304 U. S. 458 (1938) (12a).

Turning to the question of whether or not Carafas had exhausted his state remedies, the Court below pointed to language in decisions of the New York Court of Appeals and the Appellate Division to the effect that each of those courts had considered Carafas' constitutional claim, in support of a finding "that both courts treated the possibility of failure to object at trial as irrelevant" (12a). In view of that finding, the Circuit Court deemed it "wasteful of time and judicial resources" to require any further state court proceedings (13a). The case was accordingly remanded to the District Court for a determination on the merits (13a).

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* Numbers in parentheses followed by the letter "a" refer to pages in the appendices to this brief.

On July 16, 1964 the Court of Appeals reversed and remanded the *Wilson* case in light of the *Carafas* decision (22a).

On July 21, 1964 the Circuit Court decided the *West* case. The New York Court of Appeals had previously held that West's conviction was valid, reversing an Appellate Division decision vacating West's conviction (23a-25a). The state Court of Appeals had held that West waived his right to appeal on the *Mapp* issue because of his counsel's failure to object to the introduction of the evidence (25a). Again citing the *Angelet* and *Carafas* cases, the Circuit Court remanded the *West* case to the District Court for a determination of the merits (32a-34a). Since there could be no question that a state court had ever considered the merits, the Circuit Court held that it was sufficient for West to have raised the *Mapp* question on his appeal in the state courts, saying that "no further state court proceedings were necessary for him to exhaust his state remedies, and the case is now ready for federal court action" (33a).

Reasons for Granting the Writ

I. In holding that the exclusionary rule announced in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), must be applied to all direct appeals pending at the time of the *Mapp* decision, the Circuit Court has decided an important question of federal law—i.e., the minimum extent to which the exclusionary rule must be applied retroactively—which should be settled by this Court.

The question of the extent to which this Court's decision in *Mapp* v. *Ohio* must be retroactively applied is, of course, of vital significance to the administration of criminal justice in virtually every state of the Union. As the appendix to the opinion in *Elkins* v. *United States*, 364 U. S. 206, 224-25 (1960), indicates, some 24 states were, as of June 19[illegible], permitting the use of such evidence at criminal trials in reliance upon the decisions of this Court

in *Wolf* v. *Colorado*, 338 U. S. 25 (1949); *Steffanelli* v. *Minard*, 342 U. S. 117 (1951); and *Irvine* v. *California*, 347 U. S. 128 (1954).

Since the date of the *Mapp* opinion, of course, all of the states have complied with its command that such evidence be excluded at trial; a significant number of the states have, however, sought to limit the impact of the decision by applying the exclusionary rule only to cases still in either the trial or direct appeal stage on the date of the *Mapp* decision.*

Some kind of limitation on the extent to which the exclusionary rule is to be applied is certainly quite in keeping with the announced purpose of the rule—to deter police misconduct. As Mr. Justice STEWART emphasized in his majority opinion in *Elkins* v. *United States*, 364 U. S. 206 at 217:

> "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."

See also *Mapp* v. *Ohio*, 367 U. S. 643 (1961) at 656.

Acknowledgment of the fact that the deterrent purpose of the exclusionary rule will in no way be served by the release from prison of persons long since convicted on the basis of evidence whose probative value cannot be doubted, together with recognition of the desirability of leaving general control over the administration of the criminal law to the states insofar as possible, have led a number of courts and commentators to conclude that imposition of

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* See, *e.g.*, *Smith* v. *Crouse*, 192 Kan. 171, 386 P. 2d 295 (1963); *Banks* v. *State*, 228 Md. 130, 179 A. 2d 126 (1962); *Smith* v. *Warden*, —— Md. ——, 197 A. 2d 260 (1964); *Petition of Dirring*, 344 Mass. 522, 183 N. E. 2d 300 (1962); *State ex rel. Beltowski* v. *Tahash*, —— Minn. ——, 123 N. W. 2d 207 (1962); *Erving* v. *State*, 174 Neb. 90, 116 N. W. 2d 7 (1962); *State* v. *Smith*, 37 N. J. 481, 181 A. 2d 806 (1962); *Commonwealth* v. *Mancini*, 198 Pa. Super. 642, 184 A. 2d 279 (1962); *cf. State* v. *Pina*, 94 Ariz. 243, 383 P. 2d 167 (1963).

a federal requirement of general retroactive application of the rule is neither necessary nor wise. See, *e.g.*, the Second Circuit's own opinion in *United States ex rel. Angelet* v. *Fay*, 333 F. 2d 12*; also *United States ex rel. Linkletter* v. *Walker*, 323 F. 2d 11 (5th Cir. 1963); *Sisk* v. *Lane*, —— F. 2d —— (7th Cir. 1964); *Gaitan* v. *United States*, 317 F. 2d 494 (10th Cir. 1963); *Bender, The Retroactive Effect of an Overruling Constitutional Decision: Mapp* v. *Ohio*, 110 U. Pa. L. Rev. 650 (1962); *Traynor, Mapp* v. *Ohio at Large in the Fifty States*, 1962 Duke L. J. 319; Comment, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L. J. 907 (1962).

There is clearly no constitutional requirement that an overruling decision be retroactively applied. Cf. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 374 (1940); *Great Northern Ry.* v. *Sunburst Oil and Refining Co.*, 287 U. S. 358 (1932); *James* v. *United States*, 366 U. S. 213, 221 (1960); *Sunal* v. *Large*, 332 U. S. 174 (1946); *Durham* v. *United States*, 214 F. 2d 862, 874 (D. C. Cir. 1954); *Shioutakon* v. *District of Columbia*, 236 F. 2d 666, 670 (D. C. Cir. 1956); *Dooling* v. *Overholser*, 243 F. 2d 825, 829 (D. C. Cir. 1957); *Warring* v. *Colpoys*, 122 F. 2d 642 (D. C. Cir. 1941), cert. denied 314 U. S. 678.

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* In the *Angelet* case, the state appellate process had been concluded prior to the decision of this Court in *Mapp* v. *Ohio*. The State of New York has opposed the granting of Angelet's petition for certiorari (No. 212 Misc., Oct. T. 1964) because it is our position that the Second Circuit's *en banc* decision in *Angelet*, holding that the *Mapp* rule ought not to apply in such a situation, is clearly correct. We further noted, in our brief in opposition, that since this Court had already granted certiorari in a case in which the question of the application of *Mapp* rule where a state conviction had become final prior to the *Mapp* decision was presented (*Linkletter* v. *Walker*, cert. granted 377 U. S. 930, No. 95, Oct. T. 1964), there was no reason for plenary review of the *Angelet* decision. As we indicate in this petition, *infra*, pages 8-9, we feel the questions raised by the instant cases are significantly different from the question raised by the *Linkletter* and *Angelet* cases.

This Court has granted certiorari in *United States ex rel. Linkletter* v. *Walker*, 323 F. 2d 11 (5th Cir. 1963), cert. granted 377 U. S. 930 (May 18, 1963), No. 95, October T. 1964, to consider the case in which the appellate process was concluded prior to the *Mapp* decision. The instant cases, however, differ from the *Linkletter* case in several significant respects which, we submit, warrant the grant of certiorari here:

(a) In *Linkletter*, the petitioner's direct appeal from his conviction had been decided prior to the date of this Court's decision in *Mapp;* each of the instant cases was in the state appellate process when *Mapp* was decided on June 19, 1961.

(b) In *Linkletter*, the petitioner had objected at trial to the introduction of evidence claimed to be illegally seized; in each of the instant cases, the state courts have found that sufficient objection was not made at trial to the introduction of the evidence later claimed to have been illegally seized.*

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* There is some implication, in the Circuit Court's *Carafas* opinion, that New York had been unfaithful to its own rule requiring objections, and had in fact considered the merits of the search and seizure claims (App., p. 13a). In fact, however, Carafas' conviction was affirmed by the New York Court of Appeals just three weeks after that Court had held—in *People* v. *Friola*, 11 N. Y. 2d 157 (1962); *People* v. *O'Neill*, 11 N. Y. 2d 148 (1962), and *People* v. *Coffey*, 11 N. Y. 2d 142 (1962)—that a claim of improper admission of illegally seized evidence would be reviewed as a question of law only if sufficient objection had been made at trial. If Carafas had made sufficient objection the court clearly would have sent the case back for a determination by the trial court of the legality of the search. See *People* v. *Coffey*, *supra*, at 147.

Nor is the Circuit Court's assumption (App., p. 13a) that the Appellate Division adjudicated the merits of Carafas' search and seizure claims on reargument a valid one—as the Court of Appeals reinstatement of respondent West's conviction (12 N. Y. 2d 1090, 1091 [1963]; *infra*, p. 25a) amply demonstrates, the Appellate Division, on reargument, could have found the search illegal and still have affirmed, simply on the ground that it would not be "in the interests of justice" to reverse the conviction.

(c) In *Linkletter*, the validity of a state conviction was upheld; in the instant cases, the Circuit Court has held that the exclusionary rule must be applied retroactively to an extent not previously recognized by this Court, and has in the process upset state convictions and rejected New York case law holding that persons who have not preserved their *Mapp* claims by objection at trial are not entitled to consideration of the merits of their claims.

* * *

An overruling of the Second Circuit's decisions in these three cases would minimize the disruptive effects of the *Mapp* decision upon state administration of the criminal law, without in any way thwarting achievement of the purpose of the *Mapp* rule. At the same time, it would be consistent with the post-*Mapp* decisions of this Court which have held the exclusionary rule applicable to pre-*Mapp* state convictions only in situations where the defendant had objected at trial and the state courts had considered the issue of the legality of the search on appeal after *Mapp*. *Ker* v. *California*, 374 U. S. 23, 43-44 n. 15 (1963); *Fahy* v. *Connecticut*, 375 U. S. 85, 86 (1963); *Stoner* v. *California*, 376 U. S. 483 (1964).

The Circuit Court apparently rejected the New York rule (requiring objection at trial in order to raise a *Mapp* claim on post-*Mapp* direct appellate review) on the ground that a defendant's failure to object at a pre-*Mapp* trial cannot be construed as a waiver under federal standards. The difficulty with this reasoning, however, is that it *assumes* that there is a federal right to have the exclusionary rule applied in all cases still in the ordinary appellate process on the date of the *Mapp* decision regardless of whether objection was made; it ignores the fundamental question of whether the retroactive application of the rule can be more strictly limited. The New York limitation is not illogical; it grants the benefit of the rule to all defend-

ants who objected at trial as did Miss Mapp, and whose cases could therefore have been the vehicle for overruling *Wolf* v. *Colorado*. Recognition of its validity by this Court would represent a long step toward orderly administration of criminal justice.

II. Assuming *arguendo* that the Circuit Court was correct in holding that the exclusionary rule must be applied to cases in the state appellate process on the date of the *Mapp* decision, the Court's remands of these cases to the District Court with directions to determine the merits of the search and seizure claims was such a departure from the proper course of judicial proceeding as to call for the exercise of this Court's power of supervision over the federal judiciary.

In *Jackson* v. *Denno*, 377 U. S. ——, 12 L. Ed. 2d 908 (1964), this Court reaffirmed the historic role of the states as primarily responsible for administration of the criminal law; the Court made it clear that litigation of the facts necessary to a determination of a constitutional issue should take place, at least initially, in the state courts rather than in a federal habeas corpus court. 377 U. S. at ——, 12 L. Ed. 2d at 925.

The Circuit Court, in remanding these three cases to the District Court with directions to determine the merits of respondents' claims—without any provision for litigation in the state courts of the factual issues relevant to adjudication of the claims—has wholly disregarded the policy of the *Jackson* decision and the purpose of the exhaustion requirement of 28 U.S.C. § 2254.

The state courts are, of course, more familiar with problems of state law which frequently determine the threshold question in a search and seizure case (*cf. United States ex rel. Lupo* v. *Fay*, 332 F. 2d 890, 893 [2d Cir. 1964]). Moreover, they are just as responsible as the federal courts for the protection and enforcement of the constitutional rights of defendants.

The Circuit Court, in these three cases, however, has in effect created a "right" not previously recognized either by this Court or by the courts of the State of New York—a right to have the *Mapp* rule applied to a case in the ordinary appellate process on the date of the *Mapp* decision even if no objection was made at trial. If such a right is indeed determined to exist, the New York courts ought at least to have the opportunity to vindicate it.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York, August 28, 1964.

Respectfully submitted,

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Appendix A—The *Carafas* Opinions

I. New York Court of Appeals' Affirmance of Judgment of Conviction (11 N. Y. 2d 891, 182 N. E. 2d 413 [April 26, 1962])

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* CATHERINE M. CARAFAS and JAMES P. CARAFAS, Appellants.

APPEAL, by permission of a Justice of the Appellate Division of the Supreme Court in the Second Judicial Department, from a judgment of said court, entered November 6, 1961, unanimously affirming judgments of the Nassau County Court (J. ROBERT JOHNSON, Acting County Judge), rendered upon a verdict convicting defendants of the crimes of burglary in the third degree and grand larceny in the second degree. The indictment charged that, on or about June 3, 1959, defendants broke and entered a "building known as the Model House of Wedgewood Park, Inc., located at 332 Nile Avenue, Oceanside, Nassau County, New York, with intent to commit therein the crime of larceny" and stole therefrom "miscellaneous household furniture of the value of more than $100.00, with the intent to deprive the owner thereof, and of the use and benefit thereof, and to appropriate the same to the use of the defendants." The detectives who investigated the burglary and larceny testified that an automobile and a trailer were described to them as having been seen in the vicinity of the model house on the day of the burglary; that they subsequently saw these vehicles parked outside of a two-family dwelling in the Astoria section of Queens County in New York City; that they thereupon entered the dwelling through an unlocked door on the first floor; that they found on the second-floor landing of the stairway a piece of the furniture which had been reported missing from the model house; that they

thereupon placed defendants under arrest, and that they then entered the second-floor apartment occupied by defendants, where they found more of the missing furniture. No search warrant had been obtained. Photographs of the furniture, which were taken both at defendants' home and Nassau County Police Headquarters, were admitted into evidence at defendants' trial. In the Court of Appeals defendants, citing *Mapp* v. *Ohio* (367 U. S. 643), argued that the search which resulted in the finding, seizure and photographing of the furniture was unreasonable and, accordingly, unlawful; that said search was exploratory and, accordingly, unreasonable and unlawful, and that said search was not an incident to a lawful arrest and was, therefore, unreasonable and unlawful. The People argued that no objection was raised at the trial to the introduction of the photographs because they were in any way connected with an illegal search and seizure; that there was, accordingly, no ruling of the trial court to review; that the arrest was lawful since the arresting detectives knew that the crimes of burglary and larceny had been committed and had reasonable grounds to believe that defendants had committed them, and that, accordingly, the search and seizure were constitutional as incident to lawful arrest.

Judgment affirmed; no opinion.

Concur: Chief Judge Desmond and Judges Dye, Fuld, Froessel, Van Voorhis, Burke and Foster.

II. New York Court of Appeals' Amendment of Remittitur (11 N. Y. 2d 969, 183 N. E. 2d 697 [May 10, 1962])

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* CATHERINE M. CARAFAS and JAMES P. CARAFAS, Appellants.

Motion to amend remittitur granted. Return of remittitur requested and, when returned, it will be amended by adding thereto the following: Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Appellants contended that they were convicted on evidence obtained by unlawful search and seizure in violation of their rights under the Fourth Amendment of the Constitution of the United States, and that such unlawful search and seizure deprived them of their constitutional right to privacy under the Fourteenth Amendment of the Constitution of the United States. The Court of Appeals held that appellants' constitutional rights were not violated. [See 11 N Y 2d 891.]

Appendix A—The Carafas Opinions.

III. The District Court Opinion (June 22, 1963)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA *ex rel.*
JAMES P. CARAFAS,

Relator-Petitioner,

against

HON. ROBERT E. MURPHY, Warden of Auburn State Prison, Auburn, New York,

Respondent.

James T. Foley, D.J.

Memorandum-Decision and Order

The petitioner, confined at Auburn State Prison, submits a typewritten petition that as far as the typing is concerned would be the envy of a first-rate stenographer, and for content, factually and legally, many lawyers would be unable to match. He was convicted in Nassau County after trial by jury of Burglary, Third Degree, and Petit Larceny, and sentenced October 22, 1960 to a term of three to five years. The judgment of conviction was affirmed by the Appellate Division, Second Department (14 A. D. 2d 886). The Court of Appeals granted permission to appeal and affirmed without opinion, and later amended its remittitur to show a constitutional question was passed upon. (11 N. Y. 2d 891; id. 969.) Certiorari was denied 372 U. S. 948.

The federal question presented is one that promises to be troublesome for the District Court and needs, in my judgment, definite ruling in the federal Appellate Courts

to diminish to some extent the confusion, disorder and uncertainty that is not only increasing in the State Courts but in the District Court as well. The claim is that photographs of evidence allegedly seized by illegal search were introduced at the State trial over objection. The preface to the Court of Appeals decision (11 N. Y. 2d 891) indicates no objection was made to the photographs inasmuch as they were not connected with the search and seizure. It is not clear whether the Court of Appeals so found, because it did not write, but it is significant that the petitioner in his competent pleading does not refer to any page of the trial record to show that a lawyer stood on his feet and said "I object", although there are other numerous page references to the trial record. The failure to object is of extreme importance under New York rulings and its necessity is still uncertain in habeas corpus proceedings. (Hall v. Warden, Maryland Penitentiary, 4 Cir., 313 F. 2d 483, Cert. den. sub nom Pepersack v. Hall, U. S. Supreme Court 6/10/63.) The New York Court of Appeals previously held such objection was necessary for review by it. (People v. Coffey, 11 N. Y. 2d 142; People v. O'Neill, 11 N. Y. 2d 148; People v. Friola, 11 N. Y. 2d 157.) The Court of Appeals, Second Circuit, has avoided consideration of the effect of Mapp v. Ohio, 367 U. S. 643 on convictions in state courts which preceded that decision. (U. S. ex rel. Vaughn v. LaVallee, Warden, decided June 17, 1963.)

There will be much writing before the district courts and state courts will be able to find their way with any semblance of confidence. However, there does seem to be an indication in the Court of Appeals, Second Circuit, by recent decisions—and I think it wise policy—that the State, whenever there is available remedy still open, be given the courtesy to review its previous rulings in view of the recent Supreme Court rulings described by the dissenters as an abrupt break with the past. (U. S. ex rel. Rivera v. LaVallee, Warden, 2 Cir., 6/27/63; U. S. ex rel. Floyd Edgar

Martin v. Murphy, Warden, 2 Cir., 7/2/63; U. S. ex rel. Kling v. LaVallee, 2 Cir., 306 F. 2d 199.) See also Otten v. Warden, (D. C. Maryland), 216 F. Supp. 289.) I have already written in U. S. ex rel. Wilson v. Murphy, Warden, memo-decision dated June 11, 1963, that to lessen to some degree the confusion and shopping in this District I would follow the previous decision of Judge Brennan following the New York Court of Appeals decisions which in effect hold the Mapp ruling not retroactive.

I always avoid whenever possible putting a petitioner back on the merry-go-round of our endless system of review. However, there does seem good reason here. In the case of People v. Kelly, 12 N. Y. 2d 248, the Court of Appeals, New York, clarified its previous rulings as to the necessity for objections or exceptions in these unreasonable search and seizure problems. It was flatly held that intermediate appellate courts may, regardless of objections and exceptions, reverse in the interests of justice or because the trial court judgment was against the weight of evidence. In view of this new development, I think it beneficial to the interests of justice and the vital federal-state comity relationship that the petitioner should reapply to the Court of Appeals, New York, or the Appellate Division, Second Department, for possible reconsideration in view of the Kelly decision. (U. S. ex rel. Allen v. Murphy, 2 Cir., 295 F. 2d 385.)

The petition is denied without prejudice. The papers shall be filed without the prepayment of fee, and it is

So Ordered.

Dated: Albany, N. Y.
July 22, 1963.

JAMES T. FOLEY,
United States District Court Judge.

IV. District Court Order Granting Certificate of Probable Cause (August 12, 1964)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

Civil No. 9657

UNITED STATES OF AMERICA *ex rel.*
JAMES P. CARAFAS,

Relator-Petitioner,

against

HON. ROBERT E. MURPHY, Warden of Auburn State Prison, Auburn, New York,

Respondent.

James T. Foley, D.J.

Memorandum-Decision and Order

The petitioner files an application for a certificate of probable cause in relation to my memorandum-decision and order dated July 22, 1963 denying his petition for a writ of habeas corpus. Upon a review of my decision, it does seem there is sufficient substance to the question to warrant the issuance of the certificate, and such certificate of probable cause is hereby issued, and the application for the same granted.

A notice of appeal, if forwarded to W. Arthur Dwyer, Clerk of this Court, Federal Building, Utica, N. Y., shall be filed by him without the payment of the statutory fee.

It is So Ordered.

Dated: Albany, N. Y.
August 12, 1963.

JAMES T. FOLEY,
United States District Judge.

Appendix A—The Carafas Opinions.

V. Appellate Division's Denial of Motion for Reargument (—— A. D. 2d —— [2d Dept.], N. Y. Law Journal, October 30, 1963)

People, &c., res. v. Catherine M. Carafas and James P. Carafas, ap.—Motion by appellants for reargument of appeal in this court denied. It should be noted that the order of this court affirming the judgments appealed from, was since affirmed by the Court of Appeals, and that certiorari was thereafter denied by the United States Supreme Court (14 App. Div. 2d 886; aff'd 11 N. Y. 2d 891, 969; cert. denied 372 U. S. 948). It should also be noted that the appeal in this Court was decided after the decision in Mapp v. Ohio (367 U. S. 643); that such decision was urged upon this Court as a ground for reversal of the judgments; that we duly considered the Mapp decision, and that we concluded that the decision was inapplicable to the facts in this case.

VI. The Circuit Court Opinion (—— F. 2d —— [June 22, 1964])

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 28655

UNITED STATES OF AMERICA *ex rel.* JAMES P. CARAFAS,

Appellant,

—v.—

J. EDWIN LAVALLEE, Warden, Auburn Prison, Auburn, New York,

Appellee.

Before:

MOORE, KAUFMAN and MARSHALL,

Circuit Judges.

Appeal from an order of the United States District Court for the Northern District of New York, Foley, *J.*, denying without prejudice relator's application for a writ of habeas corpus.

Reversed and remanded.

KAUFMAN, *Circuit Judge*:

Contending that the fruits of an unlawful search and seizure were improperly admitted into evidence at his trial, a New York prisoner convicted before the Supreme Court's

decision in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), but whose appeal was pending when that decision was rendered, here seeks to invalidate his conviction under the Fourteenth Amendment's due process clause. While the constitutional issue was raised and considered in the state courts on direct appeal, we are asked to determine whether the petitioner's failure to object to the evidence at trial or to seek a New York collateral remedy preclude federal habeas corpus relief.

Petitioner was convicted of burglary in the third degree and grand larceny in the second degree, after a jury trial in Nassau County Court in 1960, for the alleged theft of furniture from a model home; he was sentenced to concurrent terms of from three to five years. Carafas' petition alleged that the police, acting on a tip that a Cadillac and trailer registered in his name were seen near the model home on the morning of the theft, came to his residence without a warrant. Informed that Carafas lived on the second floor of the two-family dwelling, the police proceeded up the stairway without ringing the doorbell. Carafas further alleged that upon reaching the half-way landing one of the detectives was able to observe some of the stolen furniture in his living room, and that the police then called his name, and arrested him when he appeared. Carafas attacks his conviction, claiming that approximately twenty-five photographs of the purported proceeds of the burglary, obtained as the fruits of this allegedly unconstitutional entry and search, were introduced at his trial and served as the primary basis of his conviction.

Because *Mapp* was decided after Carafas' conviction, no constitutional objection was taken at trial and the *Mapp* issue was first urged on appeal to the Appellate Division. The conviction was, however, affirmed without opinion. *People* v. *Carafas*, 14 App. Div. 2d 886, 218 N. Y. S. 2d 536 (1961). The Court of Appeals affirmed, 11 N. Y. 2d 891, 182 N. E. 2d 413, 227 N. Y. S. 2d 926 (1962), later amend-

ing its remittitur to show that the search and seizure question had been "presented and necessarily passed" upon and that Carafas' constitutional rights were not violated. 11 N. Y. 2d 969, 183 N. E. 2d 697, 229 N. Y. S. 2d 417 (1962), *cert. denied,* 372 U. S. 948 (1963).

In proceedings below the District Court did not reach the merits, and denied without prejudice Carafas' petition for a writ of habeas corpus, suggesting that he first apply to the state courts for reargument. The district judge, who decided on the petition alone without calling for the state court records, thought it significant that Carafas' pleading did not refer to any page of the trial record "to show that a lawyer stood on his feet and said 'I object.' " Apparently assuming that the constitutional claim was rejected on appeal because of this failure to object, the court held that the petitioner should reapply to the state courts for reconsideration in light of an intervening decision, *People* v. *Kelly,* 12 N. Y. 2d 248, 189 N. E. 2d 477, 238 N. Y. S. 2d 934 (1963), which held that intermediate appellate courts may, regardless of objections or exceptions, reverse in the interests of justice.

Carafas followed this suggestion, but the Appellate Division denied his motion for reargument, stating that it had duly considered the *Mapp* question and had concluded that the decision was "inapplicable to the facts in this case." N. Y. L. J., October 30, 1963.

We begin by noting that although Carafas was convicted before the *Mapp* decision, our recent holding in *United States ex rel. Angelet* v. *Fay,* —— F. 2d —— (2d Cir. June 11, 1964), in no way precludes relief. The Supreme Court and the New York Court of Appeals have clearly held that *Mapp* applies to cases in the appellate process at the time of that decision, at least where sufficient objection was made at the pre-*Mapp* trial to preserve the constitutional question for state appellate review. *Fahy* v. *Connecticut,* 375 U. S. 85 (1963); *Ker* v. *California,* 374 U. S. 23 (1963); *People* v. *Loria,* 10 N. Y. 2d 368, 179 N. E. 2d

478, 223 N. Y. S. 2d 462 (1961). In the present case, however, the State maintains that Carafas did not make any such objection at trial, and that this failure to comply with New York's procedural requirements renders federal habeas corpus unavailable, despite petitioner's contention that illegally seized evidenced was used against him at his pre-*Mapp* trial.

Although Carafas argues that he made numerous non-constitutional objections at trial to the introduction of the tainted photographs, we accept, *arguendo*, the State's position that no objections were made. Under New York law the failure to object would generally preclude raising the *Mapp* question on appeal. *People* v. *Friola*, 11 N. Y. 2d 157, 182 N. E. 2d 100, 227 N. Y. S. 2d 423 (1962); *People* v. *Coffey*, 1 N. Y. 2d 142, 182 N. E. 2d 92, 227 N. Y. S. 2d 412 (1962). But in *United States ex rel. Angelet* v. *Fay*, —— F. 2d —— (2d Cir. June 11, 1964), we held that where the law, both state and federal, at the time of trial made admissible evidence procured by an unreasonable search and seizure, the defendant's failure to object to the evidence cannot be construed as a waiver.

In *Fay* v. *Noia*, 372 U. S. 391, 439 (1963), the Supreme Court made it clear that waiver affecting federal rights is a federal question. Under the controlling standards, it is equally clear that Carafas did not intentionally relinquish a known right or privilege. *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). It would be the height of unreason, in this regard, to insist that Carafas should have objected to evidence which was properly admitted under the applicable law at the time of trial. See *United States ex rel. Durocher* v. *LaVallee*, 330 F. 2d 303, 309 (2d Cir. 1964). Moreover, we note that the Appellate Division and state Court of Appeals emphasized that they had considered petitioner's constitutional claim, thus suggesting that both courts treated the possibility of failure to object at trial as irrelevant.

Alternatively, the State argues that the denial of the writ without prejudice should be affirmed because there was no

showing that the claim of illegally obtained evidence was ever presented to a state fact-finding tribunal. We hold, however, that the exhaustion requirements of 28 U. S. C. § 2254 have been satisfied. On more than one occasion in this case a state court was given the opportunity, and did in fact, pass on the merits of Carafas' constitutional claim. The Court of Appeals in amending its remittitur and the Appellate Division in denying a motion for reargument made it clear that they had considered the *Mapp* claim and found adversely to the petitioner. Moreover, the Appellate Division's statement that *Mapp* was "inapplicable to the facts in this case" can only be read as an adjudication on the merits. It is reasonable to infer that if that court had relied merely on a finding that failure to object at trial foreclosed the *Mapp* question, it would have said so. And, we have held that the exhaustion requirement is satisfied where a constitutional claim is presented and decided on direct review of a conviction in the state courts. See *United States ex rel. Everett* v. *Murphy*, —— F. 2d —— (2d Cir. March 19, 1964). In view of the clear language of the New York appellate courts that *Mapp* does not apply to this case, we think it would be wasteful of time and judicial resources to require Carafas to test by *coram nobis* in a trial-level state court the constitutionality of his conviction.

Accordingly, we reverse the denial of the petition for a writ of habeas corpus and remand to the District Court for findings of fact and conclusions of law on whether the photographs introduced at Carafas' trial were the fruits of an unreasonable search and seizure. We, of course, express no opinion on the resolution of this question. The determination by the District Judge may be made either on the state record, which the court will undoubtedly request, or, if a full and fair hearing on the issue was not afforded in the state courts, upon a hearing *de novo*. See *Townsend* v. *Sain*, 372 U. S. 293 (1963).

Appendix B—The *Wilson* Opinions

I. Appellate Division Affirmance of the Conviction (16 A. D. 2d 207, 229 N.Y.S. 2d 685 [1st Dept., April 17, 1962])

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* HENRY WILSON, Appellant.

McNALLY, J. Defendant-appellant and a codefendant Edward Goree were convicted after a joint trial of possession in an automobile of a quantity of cocaine with intent to sell (Penal Law, § 1751). The conviction of the codefendant was affirmed by this court (*People* v. *Goree*, 8 A D 2d 614) and by the Court of Appeals (7 N Y 2d 763).

Disposition of this appeal has been held in abeyance pending our receipt and examination of the Grand Jury minutes by reason of defendant's reliance upon *People* v. *Rosario* (9 N Y 2d 286) requiring disclosure to the defendant of a prior statement in the possession or the control of the District Attorney of a witness for the prosecution. *Rosario* is to be applied to pending appeals in cases tried prior thereto. (*People* v. *Hernandez*, 10 N Y 2d 774.) On the trial the defendant applied for the inspection of the minutes of the Grand Jury. The trial court proceeded in accordance with the then applicable policy enunciated in *People* v. *Walsh* (262 N. Y. 140), examined the Grand Jury minutes, found no variance between the trial and Grand Jury testimony and thereupon denied the application for the inspection of the Grand Jury testimony.

Upon the submission of this appeal we suggested an application for the inspection of the pertinent Grand Jury minutes which was not opposed by the District Attorney. Since the submission of this appeal the Grand Jury minutes were obtained, submitted to and examined by

this court (see *People* v. *Hernandez, supra; People* v. *Turner,* 10 N Y 2d 839; *People* v. *Torres,* 15 A D 2d 452, motion for leave to appeal denied 15 A D 2d 893) and counsel have submitted memoranda with their views thereon (see *People* v. *Hawa,* 15 A D 2d 740).

Rosario sets forth a change in procedure on policy considerations to conform with the Federal rule enunciated in *Jencks* v. *United States* (353 U. S. 657). The effect of *Rosario* is to require disclosure to the defense of the pretrial statement in its entirety of a witness for the prosecution. Prior scrutiny by the Trial Judge in accordance with *People* v. *Walsh* (*supra*) has been eliminated as a condition of disclosure and as a corollary it is unnecessary to establish contradictions between the pretrial statement and the evidence at the trial. *Rosario* held nevertheless that section 542 of the Code of Criminal Procedure is applicable and therefore if it appears the error is harmless, the conviction should not be disturbed.

At the trial Detective McMahon testified that immediately after the arrest Wilson was interrogated. The following question and answer appears: "Q. Did he [Wilson] say anything? A. And he just shrugged his shoulders."

McMahon's Grand Jury testimony with regard to this episode is as follows:

"Q. • • • Did you question the defendants Henry Wilson and Edward Goree, first Henry Wilson about this brown paper bag containing the two envelopes? A. I did.

"Q. What did Wilson say? A. He said he don't know anything about it."

Wilson took the stand and gave his version as follows:

"Q. • • • he [McMahon] opened the envelope and peeped in there and asked me, who did that belong to. I said I had never seen that envelope in my life."

Defendant's trial testimony and McMahon's Grand Jury testimony are substantially the same. The variance ap-

pears in the trial testimony of McMahon to the extent he attributes to Wilson a shrug of his shoulders instead of an outright denial of knowledge.

In his summation the Assistant District Attorney argued to the jury as follows: "And Wilson shrugs his shoulders and said, 'I don't know anything about it.' "

It would seem therefore that the argument to the jury by the Assistant District Attorney gave defendant the benefit of both the shrug of his shoulders and his outright denial of knowledge as testified to by defendant at the trial and by McMahon before the Grand Jury. The variance therefore is insubstantial. It might have been otherwise if the argument made to the jury by the Assistant District Attorney had been that implicit in the shrug of the shoulders was a suggestion of guilty of knowledge on the part of Wilson by reason of failing to respond with an outright denial of guilty knowledge. Here it is clear that defendant was given the benefit of an immediate denial of knowledge of the contraband.

The only other variance relied on is with respect to McMahon's testimony as to the handling of the two glassine envelopes. The trial testimony as to this transaction is as follows:

"Q. And what did you charge them with at that time? A. 1751.

"Q. Did you know at that time that the contents of these two glassine envelopes were narcotics? A. Not for certain. That they were alleged to be narcotics.

"Q. After you took them to the station house did you do something with these two envelopes? A. Yes.

"Q. What did you do with them? A. I took the envelopes down to the grocer, after I had searched the car, and I weighed them.

"Q. Is there a colored detective attached to your precinct? A. To my precinct?

"Q. No; with you on duty that night? A. Yes.

"Q. Did you give him the envelopes to take to the drug-store? A. No, I did not.

"Q. Did these envelopes ever get into the hands of a druggist for examination? A. No, they did not.

"Q. As far as you know they never got into the hands of a druggist? A. That's right."

McMahon's Grand Jury testimony is as follows:

"Q. All right. Did you then take this brown paper bag containing the two glassine envelopes, put it in a police property clerk's envelope, seal it, and take it to the police laboratory for analysis? A. I did.

"Q. And subsequently did you get the envelope back from the police laboratory sealed? A. I did."

All that appears by comparison of the Grand Jury and trial testimony of McMahon is that his testimony before the Grand Jury was very brief and understandingly limited to its essentials whereas his testimony at the trial went into greater particularity as to the handling of the contraband.

Defendant also by his supplemental brief argues that the narcotics were seized without a search warrant and therefore should have been suppressed on the authority of *Mapp* v. *Ohio* (367 U. S. 643). In *People* v. *Loria* (10 N Y 2d 368) it was held to be the duty of the State courts to follow the *Mapp* holding. Moreover, *Loria* held that the *Mapp* rule is applicable to pending appeals. Defendant argues the search here was made without a search warrant and that the evidence resulting therefrom may not be used against him. This record does not preserve the question of the alleged illegality of the search and seizure productive of the contraband. No objection was made to the admission in evidence of the contraband (*People* v. *Friola*, 11 N Y 2d 157).

Moreover, the uncontradicted evidence is that the patrol car involved in the arrest had received a radio message described as "Signal 30" indicating that a felony was in progress. The message was to the effect that a new automobile, two-tone, with a red bottom and a cream top, was traveling north on Central Park West and was believed to be involved in the armed holdup of a liquor store. As a result of said alarm the patrol car of the officers who made the arrest herein proceeded to Douglas Circle, located at 8th Avenue and 110th Street, at which time the Thunderbird automobile occupied by defendant was observed traveling northly from Central Park West and into 8th Avenue, a continuation thereof. The Thunderbird was also two-tone with a red bottom and a cream-like top. The arresting officers associated the defendant's automobile with the one involved in the holdup announced over the radio and, accordingly, followed the defendant's automobile and made the arrest and search described on this trial.

In the circumstances there was probable cause for the arrest. (*Draper* v. *United States*, 358 U. S. 307; *Brinegar* v. *United States*, 338 U. S. 160, 172-176; *Jones* v. *United States*, 362 U. S. 257, 269-270.) The search incident to the arrest was proper although it yielded contraband unrelated to the crime for which the arrest was made. (*Harris* v. *United States*, 331 U. S. 145.) The absence of a search warrant therefore does not avail the defendant.

We have considered all other points urged by the defendant and find them to be without merit. (See *People* v. *Goree*, *supra*, 7 N Y 2d 763, *supra*.)

The judgment of conviction should be affirmed.

BREITEL, J. P., RABIN and STEUER, JJ., concur.
Judgment of conviction unanimously affirmed.

Appendix B—The Wilson Opinions.

II. The District Court Opinion (June 11, 1963)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

UNITED STATES *ex rel.* HENRY WILSON,

Petitioner,

against

HONORABLE ROBERT E. MURPHY, Warden of Auburn State Prison, Auburn, New York,

Respondent.

MEMORANDUM-DECISION AND ORDER

FOLEY, D. J.

Petitioner was convicted in February, 1958, by jury verdict of feloniously possessing a narcotic drug with intent to sell, in the Court of General Sessions, New York. His conviction was affirmed by the Appellate Division, First Department. (16 A. D. 2d 207, April 1962.) According to the petition leave to appeal was denied by the New York Court of Appeals. Certiorari was denied. (371 U. S. 852, October 8, 1962.)

The question presented here is one of unreasonable search and seizure. Judge McNally of the Appellate Division, First Department, wrote a substantial opinion on the appeal and specifically stated in regard to the unreasonable search and seizure that the question was not properly preserved by objection in accordance with the Court of Appeals, New York, decisions written after Mapp v. Ohio (June, 1961), 367 U. S. 643. The petitioner blandly

states in the petition without any reference the evidence was admitted over the objection of his counsel, but I accept the positive ruling of five distinguished state judges to the contrary. It would be absurd to assume that a statement of this kind in a judicial opinion would remain unchallenged by the lawyer of criminal experience who represented petitioner on the state appeal. There is controversy in the federal system concerning the retrospective effect of Mapp v. Ohio. (See Hall v. Warden, Maryland Penitentiary, 4 Cir., 313 F. 2d 483, pet. cert. filed and pending, contra Gratton v. U. S., 10 Cir., 4/22/63, 31 Law Week, 2532.)

More important, however, for my decision here is the fact that Judge Brennan of this District Court, in a memorandum-decision, U. S. ex rel. McCrea v. LaVallee, Warden, decided May 8, 1963, upheld the reasoning of the New York Court of Appeals that Mapp would not apply retrospectively. The decision of Judge Brennan was in accord with the State rulings that Mapp would not apply usually to state judgments of conviction which became final prior to the Mapp holding. In the situation presented here, the appellate courts of New York made their decisions when the Mapp ruling was in existence, and held that the failure to object waives and does not preserve the constitutional issue. (See People v. Friola, 11 N. Y. 2d 157.) In several instances, I have previously followed the same reasoning of the Court of Appeals, New York, as did Judge Brennan, and the reasoning of the District Court in Hall v. Warden, Maryland Penitentiary, 201 F. Supp. 639, later reversed. Serious questions await solution by writing and decision of the Court of Appeals, Second Circuit as indicated by Judge Friendly in U. S. v. Sobell, 2 Cir., 314 F. 2d 314, fn. 6.

Judge Brennan expressly held with Friola, supra, and rejected the reasoning by the Fourth Circuit in Hall v.

Warden, Maryland Penitentiary, where the same point as to the effect of failure to object was considered. Although Judge Brennan's ruling in McCrea did not cover this precise point, it is involved sufficiently here and in previous decisions of this District Court that I think the interests of comity and order dictate in this two-judge district where the shopping around is intense enough that I follow the decision of Judge Brennan in McCrea until these questions are decided by the Court of Appeals, Second Circuit. (See Dictograph Products Co. v. Sonotone Corp., 2 Cir., 230 F. 2d 131, 134-36; see also TCF Films Corp. v. Gourley, 3 Cir., 240 F. 2d 711.)

For the reasons stated, the petition is denied and dismissed. The papers shall be filed by the Clerk without the prepayment of fee, and it is

So Ordered.

Dated: Albany, New York
June 11, 1963.

/S/ JAMES T. FOLEY,
United States District Judge.

Appendix B—The Wilson Opinions.

III. The Circuit Court Opinion (—— F. 2d —— [July 16, 1964])

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 28560

UNITED STATES *ex. rel.* HENRY WILSON,

Petitioner-Appellant,

—v.—

HONORABLE ROBERT E. MURPHY, WARDEN OF AUBURN STATE PRISON, AUBURN, NEW YORK,

Respondent-Appellee.

Before:

MOORE, SMITH and MARSHALL,

Circuit Judges.

Appeal from an order of the United States District Court for the Northern District of New York, Foley, *J.*, denying petitioner's application for a writ of habeas corpus.

Reversed and remanded.

PER CURIAM:

Reversed and remanded to the District Court for a determination of the facts upon the state record or upon such hearing as the District Court deems necessary. See *United States ex rel. Carafas* v. *LaVallee*, —— F. 2d —— (2 Cir.), decided June 22, 1964.

Appendix C—The *West* Opinions

I. Decision of the Appellate Division, Third Department, Reversing Conviction (15 A. D. 2d 686, 223 N.Y.S. 2d 448 [January 17, 1962; order entered January 30, 1962])

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. LEON WEST, Appellant.—Argument May Term 1961 and reargument at September Term 1961 directed to the effect of the decision in *Mapp* v. *Ohio* (367 U. S. 643). Judgment reversed and a new trial granted for the reasons and purpose stated in *People* v. *Loria* (10 N Y 2d 368) and upon its authority. We do not consider the other contentions advanced by appellant herein to warrant a reversal. Bergan, P. J., Coon, Gibson, Herlihy and Reynolds, JJ., concur.

II. New York Court of Appeals Order of Remittal (12 N. Y. 2d 995, 189 N. E. 2d 620 [February 21, 1963])

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, *v.* LEON E. WEST, Respondent.

Decision withheld and case remitted to the Appellate Division with a request that the court resettle its order so as to state whether, except for the asserted question of law, it would have affirmed upon the facts.

III. Appellate Division's Amended Order of Reversal (18 A. D. 2d 1047, 240 N.Y.S. 2d 159 [March 14, 1963])

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. LEON WEST, Appellant.—Order of January 30, 1962 resettled to provide: Ordered that the judgment of conviction be and hereby is reversed and a new trial granted for the reasons and purpose stated in *People* v. *Loria* (10 N Y 2d 368) and upon its authority. We do not consider the other contentions advanced by appellant herein to warrant a

reversal. Except for the asserted question of law the court would have affirmed on the facts. Present—Bergan, P. J., Coon, Gibson, Herlihy and Reynolds, JJ.

IV. New York Court of Appeals' Decision Reinstating Conviction (12 N. Y. 2d 1090, 190 N. E. 2d 532 [April 4, 1963])

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, *v.* LEON E. WEST, Respondent.

APPEAL, by permission of the Presiding Justice of the Appellate Division of the Supreme Court in the Third Judicial Department, from an amended order of said court, entered January 30, 1962, which (1) reversed, on the law, a judgment of the Albany County Court (MARTIN SCHENCK, J.), rendered upon a verdict convicting defendant of a violation of subdivision 2 of section 1751 of the Penal Law (possession of narcotics with intent to sell), and (2) granted a new trial "for the reasons and purpose stated in" *People* v. *Loria* (10 N Y 2d 368) "and upon its authority". On February 21, 1963, after argument of the appeal before it, the Court of Appeals withheld decision and remitted the case to the Appellate Division with a request that the said court resettle its order so as to state whether, except for the asserted question of law, it would have affirmed upon the facts (see 12 N Y 2d 995). On March 14, 1963 the Appellate Division resettled the order appealed from to provide that "Except for the asserted question of law the court would have affirmed on the facts." (See 18 A D 2d 1047.) In the Court of Appeals defendant argued that evidence used against him was illegally obtained by means of an unlawful and unreasonable search and seizure following an unlawful arrest; that his constitutional rights to counsel and against self incrimination were violated; that

subdivision 2 of section 1751 of the Penal Law was unconstitutional insofar as it created a presumption of intent to sell or give away narcotics from the mere fact of possession thereof; that the trial court committed reversible error in its charge and in ruling on the admissibility of certain evidence; that a confession made by him was obtained under the influence of fear produced by threats, and that his guilt was not proven beyond a reasonable doubt.

Order reversed and judgment of the County Court, Albany County, reinstated upon the ground that, when counsel for defendant voiced "no objection" to the admission into evidence of the material allegedly obtained contrary to the principles enunciated in *Mapp* v. *Ohio* (367 U. S. 643), no question of law was preserved for review by any appellate court (*People* v. *Friola*, 11 N Y 2d 157; *People* v. *Kelly*, 12 N Y 2d 248). Although the Appellate Division is empowered to consider the legality of the evidence in deciding whether to reverse on the facts or in the "interests of justice" (see *People* v. *Kelly, supra*), that court has indicated in the present case that "Except for the asserted question of law [it] would have affirmed on the facts". Other alleged errors raised by defendant on this appeal are without substance. No opinion.

Concur: Chief Judge DESMOND and Judges DYE, FULD, VAN VOORHIS, BURKE, FOSTER and SCILEPPI.

Appendix C—The West Opinions.

V. The District Court Opinion (August 12, 1963)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
LEON F. WEST,

Petitioner,

against

J. EDWIN LAVALLEE, Warden of Clinton Prison,
Dannemora, New York,

Respondent.

James T. Foley, D. J.

Memorandum-Decision and Order

The petitioner, in a neat, handprinted application for habeas corpus, sets forth with clarity eight contentions that he deems worthy of federal consideration. In my judgment only two reach such stature and those are the now familiar claims first, that evidence seized by illegal search, and secondly, a confession extracted by coercion, were admitted in evidence at his trial. The petitioner was convicted after trial by jury in Albany County in October, 1959, of the crime of possession of narcotics with intent to sell, and sentenced as a third felony offender to a term of eight to sixteen years. The appeal reached the Appellate Division, Third Department, and was argued June 8, 1961; and when the important ruling with abrupt change from the past was handed down by the United States Supreme Court in Mapp v. Ohio, 367 U. S. 643 (June 19, 1961), the matter was reargued. The Appellate Division,

Third Department, reviewed the conviction and granted a new trial referring specifically to People v. Loria, 10 N. Y. 2d 368 (15 A. D. 2d 686).

Presiding Justice Bergan granted permission to appeal to the Court of Appeals, and after resettlement procedures it was certified by the Appellate Division, Third Department that its ruling embodied solely a question of law, and except for such asserted question of law that Court would have affirmed the conviction on the facts. (12 N. Y. 2d 995; 18 A. D. 2d 1047.) The Court of Appeals, New York, unanimously reversed the order of the Appellate Division and reinstated the judgment of the Albany County Court upon the specific ground that the voiced "no objection" of defense counsel to the admission of evidence alleged on appeal to have been illegally seized, preserved no question of law for review by any appellate court of New York, despite the Mapp ruling. (People v. West, 12 N. Y. 2d 1090.) It is significant to note that with this apparent judicial and careful approach to the points raised on appeal both the Appellate Division and the Court of Appeals expressed the view in their opinions that other alleged errors lacked merit and substance.

The aftermath of the ruling in Mapp v. Ohio, supra, has been the creation of a patchwork of varying interpretations and distinctions with, I am sure, many more to come. The retroactive effect of the ruling is immersed, and may be for a long time before final definite ruling, in a cauldron of controversy. (Hall v. Warden, 4 Cir., 313 F. 2d 483, cert. den. sub nom. Pepersack v. Hall, 374 U. S. 809, 10 L. ed. 2d 1032 (6/10/63); Hurst v. People (N. D. California), 211 F. Supp. 387, 395; contra Gaitan v. U. S., 10 Cir., 317 F. 2d 494.) New York, through its Court of Appeals in a series of opinions, has limited retroactive application and clarified the circumstances in which the Mapp ruling would be applied. (People v. Loria, 10 N. Y.

2d 368; People v. Coffey, 11 N. Y. 2d 142; People v. O'Neill, 11 N. Y. 2d 148; People v. Muller, 11 N. Y. 2d 154; People v. Friola, 11 N. Y. 2d 157; People v. Meyer, 11 N. Y. 2d 162; People v. Wade, 12 N. Y. 2d 61; People v. Kelly, 12 N. Y. 2d 248.) More important, however, is the fact that Judge Brennan of this District Court in U. S. ex rel. McCrea v. LaVallee, Warden, decided May 8, 1963, expressly followed these rulings of the New York Court of Appeals and refused to apply the Mapp doctrine retroactively. In the interests of order and comity in this two-judge district, I adopted and followed the reasoning and ruling of Judge Brennan in this respect. (U. S. ex rel. Wilson v. Murphy, Warden, decided June 11, 1963.) These serious questions that must await authoritative appellate ruling have been recognized but have not yet been decided by the Court of Appeals, Second Circuit. (U. S. v. Sobell, 2 Cir., 314 F. 2d 314, 322, fn. 6; U. S. ex rel Vaughn v. LaVallee, 2 Cir., decided 6/17/63.) The record of the trial has been furnished by the petitioner and at my request appellate briefs have been supplied by the Assistant District Attorney Lyons, of Albany County, who prosecuted the case, and shall be filed with the Clerk of this Court. Although I do not reach the merits of the illegal search and seizure challenge, it is clear in the trial record that the defense counsel unequivocally expressed himself as having "no objection" to the introduction of the heroin packets and containers. (pgs. 33-36, 132-34.) The answer to be presumed for this position, of course, was the defense that the heroin was brought into the house of the defendant in a brown paper bag by his girl friend unknown to him. The girl friend testified at the trial that an acquaintance, known only by his first name, gave her the brown bag in a grill to take care of for a couple of hours, and she did not know the contents. The failure to object, done knowingly and pursuant to defense strategy,

may waive constitutional infirmity if it did exist. (U. S. ex rel. Reid v. Richmond, 2 Cir., 295 F. 2d 83, 89-90; Ker v. California, 374 U. S. 23, 10 L. ed. 726, 744, n. 15.) It would also seem logical answer to deny federal intrusion at this time by reason of the failure to object because such strategy of defense counsel results in a situation where the State had no reason or opportunity to produce further evidence, if necessary, that would justify legally the search and seizure.

The coerced confession claim is one with which this District Court has had considerable experience. U. S. ex rel. Kiernan v. LaVallee (NDNY), 191 F. Supp. 455.) It is a troublesome, delicate challenge that results in sharp division and extensive writings by the highest authority. (See Spano v. New York, 360 U. S. 315, 321, n. 2.) It is a field of law uncertain in guide and principle except for a statement of generalities to be applied to the facts. It is fundamental and settled that the totality of circumstances must be considered. (Fikes v. Alabama, 352 U. S. 191, 197.) It did seem settled that in the federal review the federal courts should remain away from the disputed fact area. (Thomas v. Arizona, 356 U. S. 390, 402-403; compare Townsend v. Sain, 372 U. S. 293.)

In the record here, the examination and offer of evidence as to the voluntariness of the confession described as a "trial within a trial" is contained in pages 39 to 108. The record is complete on this issue and the defense attorney stated that he had nothing further to offer on the issue of voluntariness other than the testimony of petitioner (p. 69). I have read through such testimony. My evaluation and findings are that the voluntariness of the confession is supported factually in the record to such degree by acceptable evidence that the drastic conclusion to void the confession would need the straining to the extreme of a few isolated factors. The physical abuse claimed by the peti-

tioner was flatly denied by several witnesses. Together with the testimony of the detectives in and around the scene we have the additional testimony contradictory of abuse or coercion of the District Attorney and the Grand Jury stenographer, and a reporter from the local newspaper. The newspaperman observed the petitioner during and after the period of questioning at close range, and saw no marks of physical abuse or lumps that swelled his head, as he claimed, and heard no protest by him as to coercion. It is undisputed that the questioning lasted approximately three hours in the evening and admittedly done by one detective who alone typed out the statement which the defendant signed, and asked the questions. Coffee, sandwiches and cigarettes were obtained and given to the petitioner and his friends, also arrested with him, who were detained in a room nearby. The request for a lawyer made by defendant is the testimony of the petitioner alone, and the detective who questioned him admitted that he did not advise of right of counsel, but never was asked, nor did he admit, from my review of the record, that the request was made and answered by him as the defendant described it. (See Spano v. New York, supra; Crooker v. California, 357 U. S. 433; Cicenia v. U. S., 357 U. S. 504; Culombe v. Conn., 367 U. S. 568.) The charge of the Court, as I read it, presented fairly and adequately without qualification or limitation the confession issue by instruction that if there was reasonable doubt as to freeness or voluntariness the confession should be totally disregarded (pp. 205, 213). There were no exceptions or requests to charge in any respect by defense counsel.

In all these situations, it has been my experience logical argument can be made for deduction and inference either way. The matters are troublesome and as Justice Goldberg wrote recently for the court in a 5-4 ruling voiding a conviction upon this same type claim, the line between

proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw. (Haynes v. Washington, decided May 27, 1963, 373 U. S. 503, 515.) This opinion may foreshadow as others reecntly have that psychological pressures, unfair inducements and incommunicado detention for questioning may be violative of constitutional rights under certain circumstances. These new rulings should be read carefully by the law enforcement officers and prosecutors of the States, because impropriety in a constitutional sense may make vain the expenditure of time and effort in criminal investigations and trials.

However, in this situation, it is my firm conclusion there is not enough to support a claim of conduct of any kind in the obtainment of the confession that may be determined as coercive and impermissible, and beyond the bounds of due process. (U. S. ex rel. Eckwerth v. Denno, 2 Cir., 261 F. 2d 511, cert. den. 358 U. S. 945.)

The petition is denied and dismissed The papers shall be filed without the requirement of fee, and it is

So Ordered.

Dated: Albany, New York
August 12, 1963.

/s/ James T. Foley,
United States District Judge.

Appendix C—The West Opinions.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 28667

UNITED STATES OF AMERICA *ex rel.* LEON E. WEST,

Appellant,

—against—

J. EDWIN LAVALLEE, Warden of Clinton Prison, Dannemora, New York,

Respondent-Appellee.

Before:

FRIENDLY, SMITH and MARSHALL,

Circuit Judges.

Appeal from an order of the United States District Court for the Northern District of New York, James T. Foley, *Judge,* dismissing an application for a writ of habeas corpus. Reversed and remanded.

PER CURIAM:

In this habeas corpus proceeding, relator, a state prisoner held pursuant to a judgment of conviction of the Albany County Court of the crime of possession of narcotics with intent to sell, alleged that illegally seized evidence was introduced at his trial and that a confession obtained under duress was used against him, in violation

of his rights under the Fourteenth Amendment. The court below dismissed the writ without a hearing.

Petitioner's trial was held in October, 1959, and he appealed to the Appellate Division, Third Department. After the decision in *Mapp* v. *Ohio,* 367 U. S. 643 (1961), his appeal was ordered reargued, and the Appellate Division reversed, on the *Mapp* grounds. 15 A. D. 2d 686 (1962). However, the Court of Appeals in turn reversed this decision, holding that petitioner had waived his right to appeal on this issue because of his counsel's failure to object to the introduction of the evidence. 12 N. Y. 2d 1090, 240 N. Y. S. 2d 159 (1963).

The District Court, in ruling on relator's application for the writ of habeas corpus, determined that the rule in *Mapp* should not be applied retroactively to any extent. In view of our subsequent decision in *U. S. ex rel. Carafas* v. *Murphy,* —— F. 2d —— (1964), this was error when applied to a case which was within the ordinary appellate process when *Mapp* was decided. And West's failure to object to the evidence at his trial when the law was squarely against him cannot be considered a waiver of his constitutional rights. *U. S. ex rel. Angelet* v. *Fay,* —— F. 2d —— (2 Cir. 1964). Since the petitioner raised this issue on direct appeal, no further state court proceedings were necessary for him to exhaust his state remedies, and the case is now ready for federal court action. As the state may wish to develop a fuller record on the circumstances of West's arrest, we will remand for a determination of petitioner's claim, including a hearing if this is deemed necessary.

The claim based on the allegedly involuntary nature of the confession was not urged during oral argument of this appeal. Since the date of the argument, however, the Supreme Court decided *Jackson* v. *Denno,* —— U. S. ——, and *Escobedo* v. *Illinois,* —— U. S. ——, which may be

relevant to the question whether admission of the confession into evidence violated petitioner's federal constitutional rights. In view of our conclusion on the first phase of the case, we do not reach these questions but leave the decision on them to petitioner and the District Court.

The Court expresses its thanks to Daniel I. Davidson and Lester S. Bardack, Esqs., assigned counsel, for their effective presentation of appellant's case.

Reversed and remanded for further proceedings.